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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FRANK LEWIS SINCOX, Defendant and Appellant.	G045723 (Super. Ct. No. 09CF0998) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Affirmed as modified.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Ronald A. Jakob and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Frank Lewis Sincox challenges his conviction for second degree murder and active gang participation. He contends no substantial evidence supported the active gang participation conviction, the court wrongly denied his mistrial motion, and the court's incomplete jury instruction was prejudicial. These claims all depend on the assumption the jury applied the natural and probable consequences theory of murder. But the record does not bear out that assumption. And we reject each of his contentions.

Defendant also asserts two sentencing errors, which the Attorney General concedes. We modify the judgment accordingly, and affirm.

FACTS

Defendant was a member of the Fifth Street criminal street gang. One night he was hanging out and smoking methamphetamine with some fellow gang members. They got into a van and started driving. One of them started "challenging" defendant and another gang member in the van, Martinez. He told them "they don't know how to gang bang," so they should "go out today and do something."

Someone called one of the gang members to report a "suspicious" man in Fifth Street territory. One said they should "go gang banging, smashing some guys." They drove down Fifth Street and found Alex Moreno Cruz, who matched the caller's description. The gang members threw gang signs at Cruz, and he threw gang signs back.

Defendant and Martinez got out of the van. Martinez "had [his] knife out." It was a "special edition" "Winchester" knife. Defendant and Martinez "hit up" Cruz, asking where he was from (i.e., what gang he was affiliated with). Cruz answered: "I'm from nowhere"; "I don't bang." Defendant and Martinez began beating him up. Martinez stabbed Cruz four times, killing him.

Defendant was charged with one count of murder (Pen. Code, § 187, subd. (a))[1] with the special circumstance of murder committed for street gang purposes (§ 190.2, subd. (a)(22)), one count of street terrorism (§ 186.22, subd. (a)), and one count of conspiracy to commit murder (§ 182, subd. (a)(1)). The information alleged defendant committed the murder to benefit a criminal street gang. (§ 186.22, subd. (b)(1)(c).) It further alleged defendant suffered one prior serious and violent felony conviction (§§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1)), and one prior active gang participation conviction (§ 667, subd. (a)(1)), and had served a prior prison term (§ 667.5, subd. (b)).

A jury acquitted defendant of first degree murder and conspiracy, but found him guilty of second degree murder and active gang participation. It found defendant committed the murder to benefit a criminal street gang. The court sentenced defendant to a total term of 25 years to life in state prison. It imposed a 15 years to life term for the murder, a consecutive 10-year term for the gang enhancement, and a concurrent two-year term for the active gang participation.

DISCUSSION

Substantial Evidence Supports the Active Gang Participation Conviction

Defendant contends insufficient evidence supported his conviction for active gang participation. He begins with the premise the jury must have convicted him of second degree murder pursuant to the natural and probable consequences doctrine. As he understands it, he was found guilty of murder because he committed battery or disturbing the peace by "hitting up" Cruz, with the reasonably foreseeable result that Martinez would kill Cruz. But those misdemeanors cannot support active gang

[1] All further statutory references are to the Penal Code.

participation, i.e., they do not show he "willfully promote[d], further[ed], or assist[ed] in . . . felonious criminal conduct . . . ."[2] (§ 186.22, subd. (a).) Defendant states willful promotion is equivalent to aiding and abetting. (See *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1308.) And no substantial evidence shows he aided or abetted the murder. We know this, he asserts, because he was acquitted of premeditated murder and conspiracy. And no evidence suggested he intended to murder Cruz — that, he concludes, is why the jury applied the natural and probable consequences doctrine.

But the prosecution advanced two theories of liability for murder: the natural and probable consequence doctrine, and aiding and abetting. Prosecutors are allowed to argue alternative theories, and we may affirm on either theory if it is sufficiently supported. "Ordinarily, if an alternative theory of criminal liability is found unsupported by the evidence, the judgment of conviction may rest on any legally sufficient theory unaffected by the error, unless the record affirmatively demonstrates that the jury relied on the unsupported ground." (*People v. Sanchez* (2001) 26 Cal.4th 834, 851.)

Thus, the natural and probable consequences doctrine is just a red herring. Nothing in the record affirmatively shows the jury relied upon it. To be sure, the prosecutor did argue that doctrine might be "the easiest way [to] make a decision in this case." But the prosecutor never abandoned the aiding and abetting theory. And defendant offers no authority for his implicit assumption one cannot aid and abet a second degree murder.[3]

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[2] "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished . . . ." (§ 186.22, subd. (a).) Defendant disputes only the willful promotion element.

[3] Second degree murder may be premised on express malice, "a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) One can form

Thus, we arrive at the basic issue: Was there substantial evidence defendant aided and abetted the murder? If so, the jury could have found he "willfully promote[d], further[ed], or assist[ed] in" the murder. (§ 186.22, subd. (a).)

A defendant is liable as an aider and abettor if he or she, while "'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages, or instigates, the commission of the crime.'" (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.) "'[A]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.'" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

"'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We view the evidence in favor of the verdict, and presume the existence of every fact the jury might reasonably deduce from it. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Here, substantial evidence shows defendant aided and abetted the murder.

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that intent to kill without deliberating and premeditating; any other rule would "emasculate the statutory difference between first and second degree murder." (*People v. Thomas* (1945) 25 Cal.2d 880, 898 [specific intent to kill, without more, insufficient to support first degree murder].) One can even aid and abet attempted premeditated murder without personally premeditating, even though aiding and abetting requires the specific intent of facilitating the crime and attempted murder requires a specific intent to kill. (*People v. Lee* (2003) 31 Cal.4th 613, 623-624.) Thus, one need not premeditate to form the specific intent required to aid and abet second degree murder. (See *People v. Woods* (1991) 226 Cal.App.3d 1037, 1047 [jury acquitted defendant of premeditated first degree murder and personal use of firearm, but record supported conviction for aiding and abetting express malice second degree murder]; but see *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166 ["It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required"].)

Defendant and Martinez were both Fifth Street gang members. As a gang expert explained, gang members equate respect with fear, violence is "their bread and butter for that respect that they're looking for," and they have to "put[] in work" to show their value to the gang. On the night of the murder, defendant and Martinez had just been insulted for not knowing "how to gang bang," and challenged to "do something" about it. Martinez "was in the habit of carrying" his special knife, as one man in the van testified. And Martinez was already armed with the knife when defendant went with him to "hit up" Cruz, an interloper in territory their gang had to protect. Defendant and Martinez attacked Cruz together, defendant hitting him while Martinez hit and stabbed him. Defendant and Martinez got back into the van and left together.

From this, the jury could reasonably conclude defendant: (1) knew Martinez had a knife and intended to use it to kill Cruz; (2) intended to facilitate the murder; and (3) aided the murder by helping Martinez confront and attack Cruz, and by fleeing with him. (See *People v. Prettyman*, *supra*, 14 Cal.4th at p. 259; *People v. Campbell*, *supra*, 25 Cal.App.4th at p. 409.) Because the record amply shows defendant aided and abetted "felonious criminal conduct" (§ 186.22, subd. (a)) — the murder — it sufficiently supports the active gang participation conviction.

The Court Permissibly Denied the Mistrial Motion

Defendant contends one sentence of the gang expert's testimony warranted a mistrial. The prosecutor asked the expert: "Would you consider that to be common or uncommon in the gang world, for a homicide to result from a hit-up?" The expert answered: "A homicide is a natural and probable consequence of a hit-up." The court sustained the defense objection and motion to strike. It told the jury: "As I instructed, ladies and gentlemen, if I order testimony stricken or an answer to go out, you're to disregard it and not consider it for any purpose." Later, outside the jury's presence, the defense moved for a mistrial. The court denied the motion, concluding its admonishment

was "more than sufficient to negate any potential prejudice . . . ." At the end of trial, the court again instructed the jury to "disregard" any stricken testimony.

"A trial court should grant a motion for mistrial 'only when "'a party's chances of receiving a fair trial have been irreparably damaged"'" [citation], that is, if it is 'apprised of prejudice that it judges incurable by admonition or instruction' [citation]. 'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' [Citation.] Accordingly, we review a trial court's ruling on a motion for mistrial for abuse of discretion." (*People v. Avila* (2006) 38 Cal.4th 491, 573.)

We agree the testimony was improper,[4] but see no abuse in the court's decision to admonish the jury rather than grant a mistrial. "We presume the jury followed the court's instructions." (*People v. Avila*, *supra*, 38 Cal.4th at p. 574 [admonishment adequate; mistrial unnecessary].) Defendant asserts the testimony was prejudicial because the whole case turned on the natural and probable consequence doctrine. But that is not necessarily true. We just discussed how the jury reasonably could have found defendant aided and abetted the murder. Thus, the expert's testimony was not "'incurably prejudicial.'" (*Id.* at p. 573.)

Any Instructional Error Was Harmless

The parties agree the court wrongly instructed the jury on active gang participation by failing to specify the "felonious criminal conduct" that defendant allegedly promoted. It omitted a paragraph from the standard form jury instruction that provided: "Felonious criminal conduct means committing or attempting to commit [any

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[4] "[O]pinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." (*People v. Torres* (1995) 33 Cal.App.4th 37, 47.)

of] the following crime[s]: _____ <insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, promoted or directly committed>." (CALCRIM No. 1400.)

But any instructional error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The only felony at issue was the murder. Closing argument made that clear. In arguing the active gang participation count, the prosecutor told the jury: "But on this day, [defendants] rode over there with fellow gangsters and helped a gang-motivated murder." She also stated: Defendants' "actions on this day, in this murder show each defendant was actively participating." These statements clarified any possible confusion. (See *People v. Visciotti* (1992) 2 Cal.4th 1, 58-59 [instructional error harmless; closing arguments clarified law]; *People v. Kelly* (1992) 1 Cal.4th 495, 526 [instructional error harmless; other instructions and "[t]he arguments of counsel also correctly explained the relevant law"]; *People v. Maurer* (1995) 32 Cal.App.4th 1121, 1130 ["Closing arguments to the jury can be a relevant consideration in the prejudice equation"].)

In claiming prejudice, defendant again invokes the natural and probable consequences doctrine. He assumes the incomplete instruction allowed the jury to find the undefined felonious conduct was battery or disturbing the peace, the misdemeanor target offenses for the natural and probable consequences theory. But the record does not affirmatively show the jury relied upon that doctrine, the prosecutor argued defendant actively participated in the murder, and overwhelming evidence shows he aided and abetted the murder. On this record, we see no prejudice.

The Sentence Must Be Modified

The parties agree the 10-year gang enhancement must be stricken and the two-year active gang participation sentence must be stayed. In general, the 10-year gang enhancement generally does not apply to offenses punishable by life in state prison, either

as "a straight life term" or as "a term expressed as years to life . . . ." (*People v. Lopez* (2005) 34 Cal.4th 1002, 1007; § 186.22, subd. (b)(5).) Thus, the 10-year enhancement cannot apply to defendant's murder conviction. And defendant cannot suffer multiple punishments for active gang participation and the underlying felony he willfully promoted. (*People v. Mesa* (2012) 54 Cal.4th 191, 197-198; § 654.)

DISPOSITION

The judgment is modified to (1) strike the 10-year enhancement imposed on the murder conviction, and (2) stay the two-year sentence for the active gang participation conviction. The court is directed to prepare a new abstract of judgment accordingly and forward it to the Department of Corrections and Rehabilitation.

As modified, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.